



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

**Memorandum**  
INDIAN HEALTH SERVICE

Date OCT 10 1985

From : Richard J. McCloskey, Chief,  
Legislation and Regulations Branch, OPEL

Subject: Legal Opinion to be Added to the "Compendium of Legal Opinions  
Concerning the Indian Health Service"

To : See Below

Attached is a legal opinion subject: Establishment of Hospital Gift shop by Employee's  
Association

DATE OF OPINION: 3/4/85 (A)

SOURCE: OGC/RA/X

If you are in addressee Category A or B (see below), you should place the opinion in your Compendium in chronological order. No future publication or distribution of this opinion will be made. The opinion will be indexed under the following subject(s) which you should note in your Compendium's "Subject Index" until such time as a revised "Subject Index" is published and distributed:

Lease, Real Property

Occasionally, an opinion will require establishment of a new Subject which must be added to the Subject Index. Any new Subjects required by this opinion follow:

Change "lease" to Lease/Use permit

If you are in Category C, you are being sent this opinion because of some factor specific to this opinion or your responsibility. You will not receive other opinions as a matter of course. You may be able to utilize the Compendium held by Category A and B addressees. The addressees represent the total distribution being made of this opinion by the Legislation and Regulations Branch.

Attachment  
Legal Opinion

COMPENDIUM ADDRESSEES

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Chief	Legislation and Regulations Branch, IHS (1 Set)
Sr. Analyst	Legislation and Regulations Branch, IHS (1 Set)
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(Continued on Reverse)

Category A: Holders of the full Compendium (Cont'd)

Director, Alaska Area Office (4 Sets) Attn: Area Director; Office of Program Formulation; General Services Branch; and Alaska Native Medical Center  
Director, Albuquerque Area Office (1 Set)  
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Director, Billings Area Office (2 Set) Attn: Ms. Christensen  
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Director, Phoenix Area Office (1 Set) Attn: Mr. Palone  
Director, Portland Area Office (1 Set)  
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OGC Public Health Division (1 Set) Attn: Mr. McCloud  
PHS Indian Hospital, Rapid City, South Dakota (1 Set) Attn: Ms. Mildred Breen  
DHHS Regional Attorney, Region V, Chicago (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region VI, Dallas (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region VII, Kansas City (1 Set) Attn: Indian Desk  
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DHHS Regional Attorney, Region X, Seattle (1 Set) Attn: Mr. McBride

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Facilities Management Branch, IHS, Albuquerque (1 Set) Attn: Mr. Shopteese  
PHS Claims Division (1 Set) Attn: Mr. Simon  
OGC, BAL Division (3 Sets) Attn: AGC; Mr. Tim White; and Ms. Sarah Hertz  
OGC, PH Division (1 Set) Attn: Ms. Reusing  
Director, Division of Indian Resource Liaison (1 Set)

Category C: Ad Hoc

March 4, 1985

Assistant Regional Attorney  
Office of General Counsel, Region X

Establishment of Hospital Gift Shop by Employees' Association

Osamu Matsutani, M.D.  
Director, Alaska Native Medical Center

QUESTION

Can the Anchorage Native Health Service Employees' Association (ANHSEA) operate a non-profit gift shop at Alaska Native Medical Center?

SUMMARY

Yes, provided that (1) the real property unit manager determines such a concession is needed and feasible, (2) the concession application is not competing with higher priority applications, and (3) the license is granted without consideration and revocable at will. The anticipated concession does not appear to be a vending facility subject to the Pandolph-Shepherd Vending Stand Act.

DISCUSSION

Section 301 of Title 5, United States Code authorizes the heads of Executive Departments to prescribe regulations for the custody, use, and preservation of its property. HHS can, under this authority, license government property for private purposes. Such a license, however, must be revocable at will, must not convey any interest in the property, must not interfere with the Government's use of the property, and must not be adverse to the interests of the United States. HHS Facilities Engineering and Construction Manual (FECM) 12-20-10A.

I understand that ANHSEA intends to operate a concession in the nature of a hospital gift shop. Such a concession would presumably include, for example, cards, flowers, gifts, books and magazines to be purchased by visitors for patients. Such a concession actually furthers the interests of the Government by enhancing the morale and welfare of patients. Further, it is HHS policy to provide for concessions which are both convenient and beneficial for employees and patients. FECM 12-70-50B.

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You questioned whether the Randolph-Sheppard Vending Stand Act, 20 U.S.C. § 107 et seq., would apply in these circumstances. Randolph-Sheppard applies only to vending facilities which is defined as automatic vending machines, cafeterias, snack bars, cart services, shelters, counters and other equipment necessary for the sale of newspapers, periodicals, confections, and tobacco products. 20 U.S.C. §§ 107c(7), 107a(a)(5). Although the ANHSEA concession may sell some of these products, a gift shop would not be a vending facility under Randolph-Sheppard.

Authority is vested in the real property unit manager to determine whether a concession is needed and feasible. FECM 12-70-50E. This is the employee with contracting authority and with first level delegated responsibility and accountability for the realty. FECM 12-60-30. Although I am not familiar with your delegations of authority, I presume the real property unit manager for ANMC would be the Executive Officer or Area Director.

The need for a concession is determined by the following criteria: (1) whether sufficient funds are available to defray any costs to be incurred by the Department; (2) whether space is available and not required for official purposes; (3) whether it will be possible for the concession to operate in conformance with safety, health, and sanitation codes; and (4) that the commodities and services sold are limited to those which are beneficial for employees and patients and which cannot easily be obtained from existing facilities. FECM 12-70-50B.

Among competing applications for the operation of concessions, priority shall be given to: (1) activities conducted by PHS (a) to establish industries, plants, and shops for rehabilitation and therapy of narcotic addicts or other persons with drug abuse and drug dependence problems, 42 U.S.C. § 258, and (b) to sell products under 25 U.S.C. § 47, the Buy Indian Act; (2) vending facility for the blind; (3) HHS Employee Associations; and (4) private individuals and organizations. FECM 12-70-50C. Once the real property unit manager determines that a concession is needed, ROFEC will want to review the plans for compliance with health, fire and safety codes. Because the concession will be part of ANMC, it may have to meet stricter codes applicable to hospitals.

A license to operate the concession should be granted in the corporate name, and the licensee should carry insurance protecting it from liability incurred in the course of its business, including protection against revocation of the license by HHS.

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I understand a goal of ANUSLA is to eventually establish a day care center for children of employees. You may be interested to know that statutory authority exists for the department, by contract or otherwise, to establish, equip and operate day care centers for children who are members of households of employees. Although no appropriated funds may be used to equip or operate the centers, HHS may donate appropriate space and may purchase the initial equipment, which must be reimbursed over the expected life of the equipment, not to exceed 10 years. 20 U.S.C. § 2564.

Ellen A. Miyasato

cc: Richard Frost